

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 10, 2009

STATE OF TENNESSEE v. WILEY MOORE, JR.

Appeal from the Circuit Court for Rutherford County
No. F-46568 Robert E. Corlew, III, Judge

No. M2008-01524-CCA-R3-CD - Filed July 30, 2009

Appellant, Wiley Moore, Jr., pled guilty in Rutherford County to hindering a secured creditor in violation of Tennessee Code Annotated section 39-14-116. In March of 2008, the trial court granted judicial diversion in exchange for the guilty plea and the judgment specified that a “restitution hearing [was] to be scheduled.” The trial court ultimately ordered Appellant to pay \$15,870 in restitution and interest. Appellant filed a timely notice of appeal under Tennessee Rule of Appellate Procedure 3. On appeal, Appellant asks this Court to determine whether interest may be awarded as part of restitution. We determine that no final judgment of conviction exists that would entitle Appellant to an appeal pursuant to Tennessee Rule of Appellate Procedure 3 and that Appellant has not presented a compelling case for the grant of an extraordinary appeal under Tennessee Rule of Appellate Procedure 10. Accordingly, the Appellant’s appeal is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

James L. Baum, Burns, Tennessee, for the appellant, Wiley Moore, Jr..

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William C. Whitesell, District Attorney General; and Jude Santana, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In November of 1998, the Rutherford County Grand Jury indicted Appellant with hindering a secured creditor in violation of Tennessee Code Annotated section 39-14-116. Specifically, the indictment claimed that Appellant:

while claiming ownership of or interest in property which was the subject of a security interest, security agreement, deed of trust, mortgage, attachment, judgment or other statutory or equitable lien, unlawfully and knowingly did transfer or encumber the said property subject to a security interest to-wit: REAL ESTATE with the intent to hinder enforcement of said interest or lien held by STEVE WEITZMAN in violation of T.C.A. 39-14-116.

Subsequently, in March of 2008, Appellant pled guilty to hindering a secured creditor. In exchange for the guilty plea, the trial court granted an alternative sentence of diversion for one year. The judgment specified that a restitution hearing was “to be scheduled.” Appellant was also ordered to pay court costs in the amount of \$610.75.

The trial court held a hearing on May 29, 2008, on the matter of restitution. The transcript of this hearing does not appear in the record on appeal. The trial court entered an order on July 3, 2008, finding:

[T]he only issue before the Court was the amount of restitution payable to the victim. After considering the argument of counsel, testimony of the victim Mr. Weitzman, and the Defendant Mr. Moore; the Court finds as follows:

The victim is entitled to \$8,355 as the second lien holder. This amount represents the sale price of the land minus the value of the first lien. Additionally, the victim is entitled to interest at a rate of 10% from the date his security interest was hindered. The total judgment is \$15,870.

Appellant filed a notice of appeal, challenging the “final judgment” of the Rutherford County Circuit Court. Appellant subsequently filed a notice that no transcript or statement of the evidence would be filed on appeal.

On October 13, 2008, the State filed a motion to dismiss the appeal as being improperly filed under Tennessee Rule of Appellate Procedure 3. Appellant responded on October 24, 2008, with a request to convert the case to an appeal under Tennessee Rule of Appellate Procedure 10.

Analysis

On appeal, Appellant argues that the trial court erred by awarding interest as a part of restitution. Specifically, Appellant argues that under Tennessee Code Annotated section 40-35-304(e), “only special damages and reasonable out-of-pocket expenses may be awarded as restitution” and “interest on a restitution award is not special damages because it is not an actual loss; it is not sustained in the circumstances of the particular wrong” but merely presumed to have arisen as a result of the wrong complained of by the victim. The State, on the other hand, contends that this Court should dismiss the appeal as improper under Rule 3 of the Tennessee Rules of Appellate Procedure. Specifically, the State argues that a grant of judicial diversion does not result in a final

judgment of conviction and, therefore, no appeal as of right exists. In the alternative, the State argues that the case is not proper for an appeal under Rule 10(a). Further, the State posits that this Court must “assume that any evidence put on at the hearing supports the trial court’s award of interest as special damages” because Appellant failed to include a transcript. Therefore, the State concludes that the trial court properly ordered interest as a part of restitution.

At the outset, we must determine whether this Court has jurisdiction of Appellant’s appeal. Judicial diversion allows a defendant that is adjudicated guilty to, “upon successful completion of a diversion program, receive an expungement from all official records any recordation relating to ‘arrest, indictment or information, trial, finding of guilty, and dismissal and discharge’ pursuant to the diversion statute.” *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999) (quoting T.C.A. § 40-35-313(b)). “The effect of discharge and dismissal under the diversion statute ‘is to restore the person . . . to the status the person occupied before such arrest or indictment or information.’” *Id.* (quoting T.C.A. § 40-35-313(b)). A final disposition of the case does not occur until either the defendant successfully completes the diversion program or violates a condition of his release. *State v. Teresa Dockery*, No. E2001-01493-CCA-R3-CD, 2002 WL 1042187, at *2 (Tenn. Crim. App., at Knoxville, May 23, 2002), *perm. app. denied*, (Tenn. Nov. 2, 2002); *State v. Glenna Kidd*, No. 01C01-9808-CR-00344, 1999 WL 298309, at *1 (Tenn. Crim. App., at Nashville, May 13, 1999). Judicial diversion may be ordered only with the consent of a “qualified defendant.” T.C.A. § 40-35-313(a)(1)(A).

The Tennessee Rules of Appellate Procedure require this Court to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). In this case, the trial court granted judicial diversion to Appellant. Under the provisions of the judicial diversion statute, if Appellant does not violate any of the conditions of probation, the court shall dismiss the proceedings without an adjudication of guilt. T.C.A. § 40-35-313(a)(2).

In *State v. Norris*, 47 S.W.3d 457, 461-63 (Tenn. Crim. App. 2000), this Court concluded that an Appellant has no appeal as of right pursuant to Rule 3(c) of the Tennessee Rules of Appellate Procedure when the Appellant has been granted judicial diversion. *Id.* at 462. This Court determined in *Norris* that it is fair to disallow an appeal as of right from the grant of judicial diversion because “a trial court may not impose judicial diversion except with the defendant’s consent.” *Id.* (citing T.C.A. § 40-35-313(a)(1)(A) (1997)). “As a practical matter, a trial court rarely if ever grants judicial diversion until a defendant has literally begged for it.” *Norris*, 47 S.W.3d at 462. In other words, even though the grant of judicial diversion jeopardizes a defendant’s opportunity to raise a legal issue on appeal, the defendant who accepts diversion can emerge from the process without a conviction. *Id.*

In *Norris*, this Court also acknowledged that the situation may arise in which a defendant granted judicial diversion may seek an appeal pursuant to Tennessee Rule of Appellate Procedure 9, governing interlocutory appeals, or Tennessee Rule of Appellate Procedure 10, governing extraordinary appeals. 47 S.W.3d at 463. In fact, an appeal filed improperly under Rule 3 may be

treated as an application for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. *Id.*; *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998); *Dockery*, 2002 WL 1042187, at *3. Under Rule 10, an extraordinary appeal may be sought “if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a). This Court should grant an extraordinary appeal when it is established that: (a) “the ruling of the court below represents a fundamental illegality;” (b) “the ruling constitutes a failure to proceed according to the essential requirements of the law;” (c) the ruling is “tantamount to the denial of either party of a day in court;” (d) “the action of the trial judge was without legal authority;” (e) “the action of the trial judge constituted a plain and palpable abuse of discretion;” or (f) “either party has lost a right or interest that may never be recaptured.” *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980).

Looking at the case herein, with the record presented to this Court on appeal, we determine that the trial court possessed jurisdiction and had the authority to place Appellant on judicial diversion. We further conclude that Appellant has failed to meet the requirements for the granting of a Rule 10 extraordinary appeal. *See State v. Sherrie Ann Collins*, No. M2007-01356-CCA-R3-CD, 2008 WL 2579170 (Tenn. Crim. App., at Nashville, June 27, 2008). Even if the ruling regarding interest was erroneous, it is not so egregious as to warrant Rule 10 reversal.¹ Accordingly, this Court lacks jurisdiction to review Appellant’s appeal, and the appeal is dismissed.

Conclusion

For the foregoing reasons, the appeal is dismissed.

JERRY L. SMITH, JUDGE

¹ We do not determine today whether an interlocutory appeal pursuant to Tennessee Rule of Procedure 9 would be the appropriate manner in which to proceed in this case.